

1 EDMUND G. BROWN JR.
2 Attorney General of the State of California
3 DANE R. GILLETTE
4 Chief Assistant Attorney General
5 JULIE L. GARLAND
6 Senior Assistant Attorney General
7 JESSICA N. BLONIEN
8 Supervising Deputy Attorney General
9 JACQUELINE MAI, State Bar No. 235224
10 Deputy Attorney General
11 110 West A Street, Suite 1100
12 San Diego, CA 92101
13 P.O. Box 85266
14 San Diego, CA 92186-5266
15 Telephone: (619) 645-3199
16 Fax: (619) 645-2581
17 Email: Jacqueline.Mai@doj.ca.gov

18 Attorneys for Respondent

19

20 IN THE UNITED STATES DISTRICT COURT
21 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

22 **JOSE RAMIREZ-SALGADO,**

23 v. Petitioner,

24 **LARRY E. SCRIBNER, WARDEN (A), ET**

25 **AL.,**

26 Respondent.

08-CV-0562 WQH (WMc)

27 **NOTICE OF MOTION AND
28 MOTION TO DISMISS;
29 MEMORANDUM OF POINTS AND
30 AUTHORITIES**

31 Judge: The Honorable
32 William McCurine,
33 Jr.

34 TO PETITIONER JOSE RAMIREZ-SALGADO, IN PRO PER:

35 PLEASE TAKE NOTICE that Respondent Larry Small,^{1/} Acting Warden of the Calipatria
36 State Prison, moves this Court to dismiss the Petition for Writ of Habeas Corpus pursuant to 28
37 U.S.C. § 2244(d)(1) and Rule 4 of the Federal Rules Governing Habeas Cases, on the ground that
38 the petition is barred by the statute of limitations. This motion is based on the notice and motion,

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40 1. The proper named respondent in this action is Larry Small, the Acting Warden at
41 Calipatria State Prison, where Ramirez-Salgado is incarcerated. *Stanley v. California Supreme*
42 *Court*, 21 F.3d 359, 360 (9th Cir. 1994) (holding that the warden where petitioner is incarcerated is
43 the proper respondent); Rule 2(a), 28 U.S.C. § 2254.

1 the supporting memorandum of points and authorities, the Court records in this action, and other
2 such matters properly before this Court. Pursuant to Local Rule 7.1(d)(2)(a), Respondent
3 submits that this motion be submitted without a hearing.

4 Dated: August 29, 2008

5 Respectfully submitted,

6 EDMUND G. BROWN JR.
7 Attorney General of the State of California

8 DANE R. GILLETTE
9 Chief Assistant Attorney General

10 JULIE L. GARLAND
11 Senior Assistant Attorney General

12 JESSICA N. BLONIEN
13 Supervising Deputy Attorney General

14 /s/ Jacqueline Mai

15 JACQUELINE MAI
16 Deputy Attorney General
17 Attorneys for Respondent

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MEMORANDUM OF POINTS AND AUTHORITIES**INTRODUCTION**

Petitioner Jose Ramirez-Salgado is an inmate at the Calipatria State Prison, currently serving a fifteen year to life sentence in prison for second degree murder, plus a four year enhancement for use of a firearm. Petitioner alleges the Board of Parole Hearings (Board) unconstitutionally denied him parole at his 2005 subsequent parole consideration hearing. However, Petitioner failed to file his claim within the one year statute of limitations provided in 28 U.S.C. § 2244(d)(1). Accordingly, Respondent moves to dismiss the petition as untimely.

LEGAL STANDARD

When presented with a petition for writ of habeas corpus, district court judges may order the respondent to file an answer, motion, or “take such other action as the judge deems appropriate.” Federal Rules Governing Habeas Cases, Rule 4. This rule is designed to afford judges flexibility in cases where either dismissal or an order to answer would be inappropriate. Federal Rules Governing Habeas Cases, Rule 4, Advisory Committee’s Notes. Specifically, judges may authorize a respondent to make a motion to dismiss in order to “avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition.” *Id.*; *see also Lonchar v. Thomas*, 517 U.S. 314, 324, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996) (recognizing as proper a motion to dismiss federal habeas petition for failure to exhaust state remedies).

ARGUMENT**THE PETITION MUST BE DISMISSED BECAUSE IT IS TIME-BARRED BY THE ONE YEAR PERIOD OF LIMITATIONS SET FORTH IN 28 U.S.C. § 2244(d).**

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that a “1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a state court.” 28 U.S.C. § 2244(d)(1). The limitation period begins to run from “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” *Id.* at (d)(1)(D). Once the limitations period begins to run, it may be tolled during the pendency of a “properly filed application for State post-conviction or other collateral review with respect to the pertinent

1 judgment or claim.” 28 U.S.C. § 2244(d)(2). An application is “pending” from the time a
 2 petitioner files his first application for state court review, until he receives a decision on his final
 3 application for state court review. *Carey v. Saffold*, 536 U.S. 214, 217-20, 122 S. Ct. 2134, 153
 4 L. Ed. 2d 260 (2002). Thus, tolling of a federal petition during the pendency of state petitions
 5 generally includes the interval between the dismissal of one state application and the filing of the
 6 next.

7 However, applications must be timely filed, or filed within a “reasonable time,” to be
 8 considered pending. *Saffold*, 536 U.S. at 217-21; *Evans v. Chavis*, 546 U.S. 189, 126 S. Ct. 846,
 9 849, 163 L. Ed. 2d 684 (2002). The United States Supreme Court explained in *Chavis* that it
 10 previously “held that timely filings in California (as elsewhere) fell within the federal tolling
 11 provision on the assumption that California law . . . did not differ significantly from other States,
 12 i.e., that California’s ‘reasonable time’ standard would not lead to filing delays substantially
 13 longer than those in States with determinate timeliness rules.” *Chavis*, 546 U.S. at 199-201.
 14 *Chavis* found that an “unexplained” and “unjustified” delay of six months, which was “far longer
 15 than the ‘short period[s] of time, 30 to 60 days, that most States provide for filing an appeal,’ and
 16 longer than the ten-day period to file an appeal to the California Supreme Court, is unreasonable.
 17 *Id.* at 201.

18 **A. The Federal Petition Was Untimely.**

19 Here, the Board’s decision to deny parole is the factual predicate from which the AEDPA
 20 limitations period runs. Petitioner was present at the hearing when the decision was announced
 21 on November 1, 2005. (Lodg. 1 - Nov. 1, 2005 Cal. Bd. of Parole Hr’g Decision at 1, 4.)^{2/}
 22 Accordingly, the statute of limitations began to run as early as November 2, 2005. In the
 23 alternative, the statute of limitations period began to run the day after Board’s decision became
 24 final on March 2, 2006. (Cal. Pen. Code § 3041(b) (the Board has 120 days to review its
 25 decision before it becomes final.) As set forth below, even if the statute of limitations period
 26 began to run from the later date of March 2, 2006, the Petition was filed after the one-year statute
 27

28 2. All lodgments are attached to the Notice of Lodgment filed concurrently.

1 of limitations period had already expired.^{3/} Petitioner's federal petition was signed 786 days
 2 later on April 25, 2008.^{4/} As will be set forth below, accounting for statutory tolling, the Petition
 3 was filed 73 days after the statute of limitations had expired.

4 Petitioner filed his habeas corpus petition with the state superior court on February 5,
 5 2006, before the Board's decision was final on March 1, 2006.^{5/} (Lodg. 1 at 1, 4; Lodg. 2 - San
 6 Diego County Super. Ct. Pet.) Petitioner is entitled to statutory tolling for the period between the
 7 filing of his state superior court petition and the court's decision. Petitioner's state petition was
 8 filed on February 5, 2006, and the court denied the petition on April 11, 2006. (Lodg. 3 - San
 9 Diego County Super. Ct. Order.) Thus, Petitioner is entitled to 66 days of tolling.

10 Statutory tolling does not apply to the 64 day delay between the state superior court's
 11 denial of Petitioner's state petition on April 11, 2006 and the filing, taken from the date of
 12 signing,^{6/} of his petition in the state court of appeal on June 15, 2006. (Lodg. 3; Lodg. 4 - Cal.
 13 Ct. App. Pet.) The 64 day delay exceeds the 'short period[s] of time, 30 to 60 days, that most
 14 States provide for filing an appeal.' *Chavis*, 546 U.S. at 201. Therefore this unexplained and
 15 unjustified delay of 64 days is unreasonable, meaning that the application was not pending and
 16 the statute of limitations should not be tolled. *Id.*

17 3. Assuming the statute of limitations period began to run from the date of the Board's
 18 decision, Petitioner filed his federal petition 192 days after the limitations period had expired. *See*
 19 discussion *infra* (905 total days ran since the Board's decision and the filing of this Petition, minus
 20 348 days of tolling, minus the 365-day statute of limitations period equals 192 days). However,
 21 Respondent will calculate the statute of limitations period from the date the Board's decision became
 22 final, to illustrate that even under a more favorable application of 28 U.S.C. § 2244(d)(1)(D), the
 23 Petition is time-barred.

24 4. Under the prison mailbox rule, "a prisoner's federal habeas petition should be considered
 25 to have been filed when he gave it to prison authorities for mailing." *Jenkins v. Johnson*, 330 F.3d
 1146, 1149 n.2 (9th Cir. 2003). However, the Petition does not include a proof of service showing
 26 the date of delivery to prison officials, and therefore, Respondent will calculate the statute of
 27 limitations period from date of signing. (See Pet.)

28 5. Respondent calculates the date of filing from the proof of service showing delivery of
 Petitioner's state court petition. *See* accompanying text and case cited *supra* note 4.

6. Respondent has no copy of a proof of service showing delivery of Petitioner's state court
 of appeal petition, and therefore, calculates the date of filing from the date Petitioner signed the
 petition. *See* accompanying text and case cited *supra* note 4. (See Lodg. 4.)

1 Petitioner is entitled to statutory tolling for the period between the filing of his state court
 2 of appeal petition, signed on June 15, 2006, and the court of appeal's denial on September 15,
 3 2006. (Cal. Ct. R. 8.264(b)(2)(A) (original writ decision final upon filing); Lodg. 4; Lodg. 5 -
 4 Cal. Ct. App. Order.) Thus, Petitioner is entitled to 93 days of tolling.

5 Statutory tolling does not apply to the 61 day delay between the state court of appeal's
 6 denial of the petition on September 15, 2006, and the filing of Petitioner's California Supreme
 7 Court petition, signed on November 16, 2006.^{7/} (Lodg. 5; Lodg. 6 - Cal. Sup. Ct. Pet.) This
 8 unexplained and unjustified delay of 61 days is unreasonable, meaning that the application was
 9 not pending and the statute of limitations should not be tolled. *Chavis*, 546 U.S. at 201.

10 Petitioner is entitled to statutory tolling for the period between the filing of his state
 11 supreme court petition, signed on November 16, 2006, and the supreme court's denial on May
 12 23, 2007. (Cal. Ct. R. 8.264(b)(2)(A) (finality); Lodg. 6; Lodg. 7 - Cal. Sup. Ct. Order.) Thus,
 13 Petitioner is entitled to 189 days of tolling.

14 Petitioner is not entitled to tolling from May 23, 2007, the date of the state supreme
 15 court's denial, and the date Petitioner filed his federal habeas corpus petition, signed on April 25,
 16 2008.^{8/} (Cal. Ct. R. 8.264(b)(2)(A) [finality]; *Saffold*, 536 U.S. at 217-20 (any tolling ends at the
 17 date of the state supreme court's decision); Lodg. 8 - First Amended Fed. Pet.) Even though
 18 Petitioner signed a federal petition on March 27, 2008, Petitioner is not entitled to tolling because
 19 it was not a properly filed application.^{9/} (28 U.S.C. § 2244(d)(2); Lodg. 9 - Fed. Pet.) This Court
 20 dismissed the Petition for failure to name a proper respondent and failure to allege exhaustion of
 21 state judicial remedies as to all claims. (Lodg. 10 - S.D. Cal. Order, Apr. 3, 2008.)

22
 23 7. Respondent has no copy of a proof of service showing delivery of Petitioner's state
 24 supreme court petition and therefore, calculates the date of filing from the date Petitioner signed the
 petition. *See* accompanying text and case cited *supra* note 4. (See Lodg. 6.)

25 8. Respondent has no copy of a proof of service showing delivery of Petitioner's first
 26 amended federal petition and therefore, calculates the date of filing from the date Petitioner signed
 the petition. *See* accompanying text and case cited *supra* note 4. (See Lodg. 8.)

27 9. Respondent has no copy of a proof of service showing delivery of Petitioner's federal
 28 petition and therefore, calculates the date of filing from the date Petitioner signed the petition. *See*
 accompanying text and case cited *supra* note 4. (See Lodg. 9.)

1 In total for the 786 day period, between the date of finality of the Board's decision and
 2 the filing of the federal petition, Petitioner is entitled to a total of 348 days of tolling. Accounting
 3 for statutory tolling and 365 days under AEDPA, the Petition was filed 73 days after the statute
 4 of limitations had expired.¹⁰

5 **B. Equitable Tolling Does Not Apply To The Petition.**

6 In very rare cases, the one-year statute of limitations for filing a federal habeas petition
 7 may be equitably tolled if "extraordinary circumstances make it impossible to file a petition on
 8 time." *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003). The burden is on the petitioner to
 9 prove that "extraordinary circumstances were the cause of his untimeliness." *Stillman v.*
 10 *LaMarque*, 319 F.3d 1199, 1203 (9th Cir. 2003). Equitable tolling "is justified in few cases,"
 11 and "the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the
 12 exceptions swallow the rule." *Spitsyn*, 345 F.3d at 799 (citing *Miranda v. Castro*, 292 F.3d
 13 1063, 1066 (9th Cir. 2002)) (internal quotation marks omitted). Equitable tolling "is justified in
 14 few cases," and "the threshold necessary to trigger equitable tolling [under AEDPA] is very high,
 15 lest the exceptions swallow the rule." *Spitsyn*, 345 F.3d at 799 (citing *Miranda v. Castro*, 292
 16 F.3d 1063, 1066 (9th Cir. 2002)) (internal quotation marks omitted). Specifically, a pro se
 17 petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting
 18 equitable tolling. *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). Here, Petitioner
 19 makes no attempt to explain why his petition was filed more than two months past the AEDPA
 20 deadline. Accordingly, he is not entitled to equitable tolling, and the petition must be dismissed
 21 as untimely.

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28 10. 786 days minus 348 days of tolling equals 438 days; 438 days minus the 365-day statute
 of limitations period is 73 days.

1 **CONCLUSION**

2 The Petition is barred by the AEDPA statute of limitations. Accordingly, the Petition
3 should be dismissed with prejudice.

4 Dated: August 29, 2008

5 Respectfully submitted,

6 EDMUND G. BROWN JR.
7 Attorney General of the State of California

8 DANE R. GILLETTE
9 Chief Assistant Attorney General

10 JULIE L. GARLAND
11 Senior Assistant Attorney General

12 JESSICA N. BLONIEN
13 Supervising Deputy Attorney General

14 /s/ Jacqueline Mai

15 JACQUELINE MAI
16 Deputy Attorney General
17 Attorneys for Respondent

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Ramirez-Salgado v. Scribner**

No.: **08-CV-0562 WQH (WMc)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 29, 2008, I served the attached **NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

JOSE RAMIREZ-SALGADO
CDC #C11124
CALIPATRIA STATE PRISON
P.O. BOX 5001
CALIPATRIA, CA 92233-5001

IN PRO PER

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 29, 2008, at San Diego, California.

S. Banks

Declarant

Signature

70135093.wpd